No. 81-55

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Writ of Certiorari to the New York State Court of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Simply because the First Amendment is involved in this case, respondent calls for a Pavlovian response to the constitutionality of New York's statute and urges this Court to "bark a resounding No." Brief for Respondent: 29. That kind of response, however, is no substitute for sound analysis. As seen from our main brief, such analysis demonstrates that New York's prohibition of the dissemination of materials depicting the sexual conduct of children is the least restrictive and most effective manner to further the compelling interest in protecting children from people who sexually exploit them in quest of profit.

In contrast, the analysis of respondent and *amici* publishers[1] is strikingly deficient in four major respects. First, they fail to comprehend the seriousness of the harm involved and thus fail to appreciate the legislative purpose in prohibiting the dissemination of the materials in question. Second, they fail to understand the reasoning which is at the foundation of the Legislature's determination to prohibit dissemination without respect to the obscene nature of that material. Third, they misconstrue the statute and thus erroneously conclude that it restricts speech in an unconstitutional manner. Fourth, they misapprehend the law of overbreadth, by overlooking completely the significance of *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

(1) Respondent and *amici* publishers fail to comprehend the harm to children who are made to engage in any and every kind of sexual conduct, and thus fail to appreciate the legislative purpose in prohibiting the dissemination of materials depicting that conduct.

At the outset, there is no doubt, despite the silence of *amici* publishers and respondent, that the state interest in protecting children from sexual abuse is "urgent" (*Lassiter* v. *Department of Social Services*, 452 U.S. 18, 27 [1981]), and "transcendent." *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968). The New York Legislature determined that children are harmed and abused when they are made, for example, to engage in sex with animals, with

1. In this reply brief the various organizations composing the *amici* arguing against the statute's constitutionality will be referred to as *amici* publishers. This is to distinguish them from the other *amici* in this case who have argued in favor of the statute's constitutionality.

adults, or with other children. The legislative judgment seems unexceptionable. *See* Brief for Petitioner: Appendix II at 9a-15a.

In an attempt to demonstrate the inadequacy of that compelling state interest, respondent (p. 25) and *amici* publishers (p. 20) mistakenly rely on *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). In the *Smith* case, this Court struck down a West Virginia statute which made it a crime for a newspaper to publish, without judicial approval, the name of a youth charged as a juvenile offender. In *Cox*, this Court held invalid a Georgia statute which made it a misdemeanor to publish or broadcast the name or identity of a rape victim. As Chief Justice Burger observed for the Court in *Smith*, these cases stand for the proposition "that if a newspaper lawfully obtains truthful information about a matter of public significance, the state officials may not constitutionally punish publication of the information absent a need of the highest order." *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. at 103-104. Here, of course, the prohibited materials do not contain news concerning matters of public significance, and are not generally disseminated by the news media. More importantly, here the state interest is more substantial than those supporting the statutes under scrutiny in the *Cox* and *Smith* cases. While publishing the name of a juvenile offender, or a rape victim, surely causes harm, it does not lead to more delinquency or to more rapes. On the other hand, the profitable dissemination of child pornography creates both a supply and demand for such materials, and thus inevitably leads to the large-scale sexual abuse of children. Prevention of that abuse is, indeed, a state interest of the "highest order."

In deciding on how best to protect children from sexual abuse, the New York Legislature started from the premise that it was unlawful to make children engage in sexual conduct. Despite the apparent difficulty which respondent and *amici* publishers have in accepting this premise, no person has the constitutional right to abuse children, regardless of whether that person is a photographer, a movie mogul, or an artist. *See* Brief for Petitioner: 11-15; *see also Griffin* v. *State*, —— Fla. ——, 396 So. 2d 152, 160 (1981) (Sundberg, C.J., concurring); *Campagno* v. *Florida*, — Fla. App. —, —— So. 2d —— (July 1, 1981), *cert. denied*, —— U.S. —— (Jan. 18, 1982); Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J.L. Ref. 295, 310 (1979). At pages 13, 14 and 15 of his brief, respondent seems to contend that in some jurisdictions it is not unlawful to produce materials by making a child engage in sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or sodomy, or to make a child appear naked and explicitly simulate any such conduct. *See also* Brief for *Amici* Publishers: 29. We know of no jurisdiction in which it is lawful to make children engage in such conduct and await anxiously their identification by respondent.

In recognizing the need to ban dissemination of materials depicting the sexual abuse of children, as well as prohibiting the abuse itself, New York, like twenty-one other states,[2] concluded that prohibiting only the direct

2. At page 13 n.4 of our main brief we said that there are only nineteen states which have similar dissemination statutes. Both Florida, Fla. Stat. Ann. §847.014, and Utah, Utah Crim. Code §76-10-1206.5(3), should be added to that list, bringing the total to 21 states in addition to New York. Further, Idaho was omitted from the list of states which do not have a dissemination statute but have only a statute which prohibits sexual use of a child. Idaho Code §44-1306.

sexual abuse of children by producers of pornography could not effectively protect children.

Unfortunately, *amici* publishers never come to grips with the New York Legislature's determinations which led to the prohibition on dissemination. Respondent, who was convicted of such dissemination, also scrupulously avoids these determinations by resorting to characterizing petitioner's analysis as "ipse dixit," "allegations of fact," and "alleged truisms" (Brief for Respondent: 7 n.1, 22 n.16), while at the same time piously announcing that he "joins in the state's concern for our young people." Brief for Respondent: 4.

Those characterizations, however, cannot alter the fact that, as found by the Legislature, prohibiting only the abuse of children and not the dissemination of the products of the abuse offers no real protection for children. To satisfy the commercial market's demand for "kiddie pornography," producers make children engage in any and every kind of sexual conduct. *See* Brief for Petitioner: 6a n.8. The production is done secretly; it is extremely difficult, if not impossible, to discover production locations or identify producers. *See* Brief for Petitioner: 19 n.9. Moreover, the dissemination of this pornography is a highly lucrative business which encourages people to seek quick high profits by producing more materials, leading, of course, to more abuse of more children. Put simply, profitable dissemination of the prohibited materials encourages their production. To be sure, this is a determination which is difficult to support by empirical data. *See* Brief for Respondent: 19. Nonetheless, it is based on common sense, sound economic theory,

the experience of law enforcement officials and the opinions of other experts. *See* Brief for Petitioner: 19-20 esp. n.9.

At page 19, respondent asserts, however, that the "unproven assumption" that prohibiting dissemination will discourage production is a "dangerous doctrine." To prove his point, respondent says that this principle would justify a state prohibiting the dissemination of materials which depict, describe, or portray other evils such as murder, drug abuse, arms building or child labor. However, the distinctions between his examples and the instant statute are clear. This statute prohibits the dissemination of material which is produced by actual sexual abuse of a child performed for the very purpose of visually memorializing that abuse. Moreover, dissemination of that material leads to a demand for additional similar materials which, in turn, results in more abuse of children. On the other hand, in the examples posited by respondent, actual unlawful conduct is not undertaken for the very purpose of producing the visual memorialization of that conduct; nor is that memorialization disseminated to an ever increasing commercial market.

Significantly, only this past March 12th, in upholding the constitutionality of Virginia's child pornography statute, the Supreme Court of Virginia followed a rationale identical to that advanced by petitioner. *Freeman* v. *Commonwealth*, —— Va. ——, —— S.E.2d —— (March 12, 1982) (reprinted in this brief at pp. 1a-17a, *infra*):

> The destiny of the state rests with its minor citizens. Children are not always aware of the dangers to which they are exposed. Children may be led and misled. The state has a compelling interest, one central to its

> right to survive, in protecting its children from treatment it determines is physically or psychologically injurious to youth. The General Assembly has determined that the production and distribution of child pornography is such treatment. The statute it has enacted was intended to further the state's interest by punishing and deterring such treatment. As the data we have discussed shows, the legislature was justified in concluding that the process of production from which the harm flows cannot effectively be curtailed unless the profit motive is contained (*id.* at 7a).

The Virginia statute at issue in *Freeman* bans distribution of child pornography only if it is "obscene for children." Va. Code §18.2-374.1. Notably, in rejecting a First Amendment challenge to that statute, the Virginia court did not rely on the fact that the statute reached only material which is obscene for children. The court did not rely on the child obscenity standard because it recognized that a state cannot prohibit dissemination to adults of materials which are obscene only for children. *See Ginsberg* v. *New York*, 390 U.S. at 634-35; *Butler* v. *Michigan*, 352 U.S. 380, 383-84 (1957). Instead, the court held the ban on child pornography constitutional because it was supported by an interest far greater than those which support obscenity statutes. That interest is the compelling need to protect children from sexual abuse in the production of child pornography. Thus, while the Virginia statute prohibited only the dissemination of material which was obscene for children, the rationale of the decision applies with equal force to the New York statute, which bans the dissemination of material

depicting the sexual conduct of children, regardless of the material's obscenity for children.[3]

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3. Unlike the Virginia court, both the New York Court of Appeals in the instant case, and the Hawaii Circuit Court in *State* v. *Shingaki*, —— Hawaii Cir. —— (April 27, 1981), in declaring their respective statutes unconstitutional merely stated in conclusory fashion that the state may prohibit only the dissemination of obscenity. Put simply, neither decision is particularly persuasive. *See* Brief for Petitioner: 9-32.

Respondent (p. 14 n.11) and *amici* publishers (p. 11 n.13) both state that in *St. Martins Press, Inc.* v. *Carey*, 440 F. Supp. 1196 (S.D.N.Y. 1977), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979), the district court held the New York statute unconstitutional. The district court believed that the most persuasive argument was that the statute violated substantive due process, not the First Amendment, because it could be read to prohibit dissemination of materials produced outside New York prior to the effective date of the statute. 440 F. Supp. at 1205. That concern, apparently based upon ex post facto principles and the extent of the state police power, is without merit. It is without merit because the dissemination sought to be prohibited occurs in New York after the effective date and the harm sought to be prevented is the abuse of children after the effective date. *See* Brief for Petitioner: 29-32. Notably, neither respondent nor *amici* publishers have seriously contended to the contrary.

Respondent (p. 23 n.18) also points to *Graham* v. *Hill*, 444 F. Supp. 584 (W.D. Tex. 1978), which he asserts held unconstitutional a "similar" Texas statute. Unfortunately, respondent fails to note that the Texas statute, Tex. Penal Code Ann. tit. 9, §43.25 (Vernon), was broader than that of New York because it prohibited the commercial dissemination of motion pictures or photographs depicting the sexual conduct of children, or depicting children observing sexual conduct. The basis for the district court's decision was that portion of the Texas statute dealing with children merely observing sexual conduct, 444 F. Supp. at 592, which is not contained in the New York statute. Notably, in its opinion the court stated that "[if] the statute was limited to prohibiting the depicting of minors actually engaged in sexual conduct, . . . the court would likely have no hesitation in declaring its constitutionality." *Id.* Subsequently, Texas passed that very kind of statute. Tex. Penal Code Ann. tit. 9, §43.25(e) (Vernon).

(2) In not requiring proof of obscenity, the New York Legislature justifiably concluded that such a requirement would impair substantially the effectiveness of a prohibition on dissemination, thereby resulting in less protection of children.

The New York Legislature, unlike the Virginia General Assembly, determined that children are abused by being made to engage in various kinds of sexual conduct regardless of whether the visual representation of that abuse is memorialized in a book or motion picture which considered as a whole is not obscene for children. *See* Brief for Petitioner: 22. Again, the conclusion seems unexceptionable, and respondent and *amici* publishers are silent. However, each argues that directly prohibiting the producer from making children engage in sexual conduct (N.Y. Penal Law §263.15) and prohibiting dissemination of only obscene materials (N.Y. Penal Law §263.15) are alternatives which sufficiently protect children. Those arguments are fully rebutted at pages 19-23 of the main brief for petitioner.[4]

In this regard, at pages 23-24 of his brief, respondent argues that petitioner contradicts itself by contending that section 263.15 could be effective, while at the same time, contending that obscenity statutes are ineffective. Re-

4. Nor is the Virginia statute, which prohibits the dissemination of materials obscene for children, sufficient to protect children. As seen from the discussion of expert testimony in the Virginia case (*see* pp. 14a-16a of this brief), the obscenity for children standard presents problems of application and definition similar to those presented by the ordinary obscenity standard. Those problems inhibit the deterrent effect of the statute. *See* Brief for Petitioner: 20-23. Further, children are still sexually abused in the production of material depicting sexual conduct which they are made to perform, regardless of whether that material is obscene for children.

spondent misses the point. Our argument is simply that obscenity statutes are ineffective deterrents because of problems inherent in obscenity prosecutions. Those problems are eliminated if proof of obscenity is not required.

Indeed, the difficulties in obscenity prosecutions are no better demonstrated than by respondent himself, when he contends that at his trial "the jury may have . . . [acquitted of the obscenity count] because it was unconvinced by the prosecution witnesses."[5] Brief for Respondent: 24. Those witnesses and defense witnesses were debating whether the films sold by respondent would appeal to the prurient interest of a specific scientifically definable group. The question whether such a definable group existed was, of course, irrelevant to the conviction under section 263.15, which has no obscenity requirement, and irrelevant, as well, to the state interest in protecting children.

The "definable group—prurient interest" issues are essential elements of an obscenity prosecution. Therefore, *amici* publishers engage in wistful speculation by suggesting that Ferber would have been convicted of disseminating an obscene film if the obscenity provisions (§263.10) were the only statute in the books. Brief for *Amici* Publishers: 22 n.24. Indeed, those, including *amici* publishers (pp. 7-8), who suggest that films which explicitly depict the sexual conduct of children will always come within the definition of obscenity, simply ignore the reality of obscenity prosecutions or fail to appreciate that the sexual abuse of children is not limited to depiction in obscene materials. Addition-

5. Another reason offered for the obscenity acquittal is the far-fetched speculation that the jury feared punishing respondent twice. Brief for Respondent: 24, Brief for *Amici* Publishers: 22 n.24.

ally, respondent's argument at page 24, n.20, that obscenity convictions after *Miller* v. *California*, 413 U.S. 15 (1973), have not decreased when the materials involved children, is perfectly consistent with our argument that substituting children for adults is hardly likely to lead to any more findings of obscenity. Brief for Petitioner: 21 n.10.

Finally, both respondent and *amici* publishers continually point to the obscenity decisions of this Court as being determinative of the present case. Those cases are not relevant because, as recognized by the Virginia Supreme Court, *Freeman* v. *Commonwealth*, slip op. at p. 7a, *infra*, the conventional ban on obscenity is based upon state interests which do not include protecting children from sexual abuse in the production of the materials disseminated. *See Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-60 (1973).[6]

To say that a statute prohibiting the dissemination of materials produced by sexually abusing children must require proof of obscenity would afford no greater protection to children than that already provided by ordinary obscenity statutes. The compelling need to protect children authorized the Legislature to dispense with the requirement of obscenity and to prohibit the dissemination of materials

6. Just as *amici* publishers and respondent incorrectly rely on obscenity cases, they are completely mistaken in asserting that the state's argument in support of the dissemination statute, as opposed to the use statute, relies heavily on *United States* v. *O'Brien*, 391 U.S. 367 (1968). *Amici* Publishers: 16, Respondent: 20. The *O'Brien* case is cited but once by petitioner, at page 16, and then only in support of the use statute (§263.05), not the dissemination statute (§263.15). With respect to the dissemination statute, we contend it is constitutional only because the Legislature was entitled to decide that it is the least restrictive alternative to achieve the compelling state interest in protecting children from sexual abuse. Brief for Petitioner: 16.

depicting the sexual conduct of children. This prohibition is the least restrictive and most effective way to meet that compelling need.

(3) The misconstruction of the statute by *amici* publishers and respondent provides no reason to conclude that the statute is unconstitutionally overbroad or vague.

In misconstruing the statute in question, *amici* publishers characterize it as prohibiting the dissemination of non-obscene materials which simply depict "naked children." Brief for *Amici* Publishers: 6. In a similar vein, respondent describes the statute as prohibiting the distribution of material which merely "addresses adolescent sex in a visual format." Brief for Respondent: 12. Both descriptions fall far short of the mark. New York Penal Law Section 263.15 does not simply address "naked children" or "adolescent sex." Rather, the statute prohibits the dissemination of non-obscene sexually explicit materials which are produced by making children engage in "sexual intercourse, deviate sexual intercourse [sodomy], bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." N.Y. Penal Law §263.00(5). This definition of sexual conduct specifies with precision the materials which cannot be disseminated and confines the prohibition much more narrowly than is implied by terms such as "naked children" or "adolescent sex."

Focusing on the term "lewd exhibition of the genitals," at page 21, *amici* publishers contend that the statute is unconstitutionally overbroad because it would encompass

"medical, scientific or educational works which, as an essential part of their content, contain sexually related pictures or naked youths." In accompanying footnote 22 at page 21, *amici* publishers refer to five scientific or medical works as examples of the statute's overbreadth. The pages cited do contain pictures of the genitals of children. However, none of these pictures presents a "lewd exhibition of the genitals." True, that term is not defined by the statute. Still, the term "lewd exhibition of the genitals" is no stranger to the law; the term means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display. *See People* v. *Heller*, 33 N.Y.2d 314, 321, 328 (1973), *cert. denied*, 418 U.S. 944 (1974); *Miller* v. *California*, 413 U.S. at 25; *Jenkins* v. *Georgia*, 418 U.S. 153, 160 (1974); *United States* v. *12 200 ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973); *United States* v. *Various Articles of Obscene Merchandise*, 460 F. Supp. 826, 830 (S.D.N.Y. 1978), *aff'd* and *rev'd* in part, 600 F.2d 394, 406 (2d Cir. 1979); *see also Hamling* v. *United States*, 418 U.S. 87, 112, 118, 120-21 (1974). None of the pictures in the cited medical texts can even arguably be said to be lewd. Indeed it is absurd even to suggest that these books are within the statute.[7]

Nor can it be argued that this definition of lewd would be inconsistent with the legislative determination not to require proof of obscenity. *See* Brief for Respondent: 9 n.6. True, the New York Court of Appeals did refuse to

7. F. Falkner, Human Development, pp. 184-221 (1966); Waldo [Nelson], Textbook of Pediatrics, pp. 1567-1570, 1623-1630 (1979); A. Rudolph, Pediatrics, pp. 1328, 1608, 1678, 1713-14 (16th ed. 1977); J. Forfar and G. Arniel, Textbook of Paediatrics, pp. 1052-55, 1115 (1973); and F. Brimblecombe and A. Barltrop, Children in Health and Disease, pp. 176, 177, 200, 204, 206 (1st ed. 1978) (formerly Paterson's Sick Children, pp. 203, 206, 208).

construe the entire statute as requiring proof of obscenity because the Legislature made it clear that with respect to the entire statute, no obscenity requirement was intended. Exhibit A to Petition for Certiorari: 3a-4a. However, it is hardly inconsistent with the legislative purpose to define a "lewd display of the genitals" as meaning "a patently offensive, lascivious, lustful or obscene display," without requiring proof of obscenity with respect to the entire work or any of the other sexual conduct specified in the statute. This is especially so since the Legislature used the word "lewd" and that word is defined as "obscene." Black's Law Dictionary, p. 817 (5th ed. 1979); Webster's Third International Dictionary, p. 1301 (unabrd. 1971); *see also* cases cited at p. 13, *supra*.

Notably, *amici* publishers' main overbreadth argument deals only with scientific, medical and educational material. *See* Brief of *Amici* Publishers: 21. There is, however, but a passing reference by *amici* publishers to artistic works at page 7 n.9. In that footnote, *amici* publishers, while expressing a concern about the term "lewd exhibition of the genitals," point to several "serious compilations of artistic photographs." Nonetheless, as just noted, that term means something more than mere nudity; none of these works have pictures which could be described as lewd.[8] Again, it

8. *See,* Nude Photographs, 1850-1980, pp. 47, 78, 125 and 134 (C. Sullivan ed. 1980) (four photographs are of a single child simply standing nude); E.A. Ruby, The Human Figure: A Photographic Reference for Artists, pp. 309-317 (1974) (a series of innocent photographs of a two year old girl); The Family of Children, pp. 84-85 (J. Mason ed. 1977) (six photographs of naked children at play, but in a totally innocent and sometimes charming way); M. Mark, Falkland Road: Prostitutes of Bombay (1981) (two photographs of thirteen and fifteen year old prostitutes with only their breasts exposed; one photograph of two sons of prostitutes lying nude on a bed); D. Hamilton, Sisters (1973) (photographic story of two young sisters of an unknown age. Some of the photographs show the girls' breasts and one girl touching the other's breasts, but no genitalia is shown).

is absurd that they are even offered as examples. Notably, not one of the books proffered depicts any sexual conduct of a child under the age of sixteen.

At page 25 n.27, *amici* publishers also point to several "sex education" books, the dissemination of which they contend would be criminal under the New York statute. Again, *amici* publishers have, for the most part, based their conclusion on a misunderstanding of the term "lewd exhibition of the genitals," which as noted does not include mere nudity.[9] Moreover, it is clear that the vast majority of nude models in these works are over sixteen or are of an undeterminable age;[10] of course there can be no prosecution if age cannot be determined. Given the narrow definition of lewd exhibition of the genitals, and the ability to use models over the age of sixteen, it is not credible for *amici* publishers to argue at pages 25-28 that somehow the ban on dissemination of materials depicting children en-

9. *See*, S. Waxman, Growing Up Feeling Good: A Child's Introduction to Sexuality (1979) (two series of pictures of children getting dressed; one of a young girl, the other of a young boy. Two other pictures, one of a nude boy, the other of a nude girl, the age of each may be over sixteen); S. Waxman, What is a Girl? What is a Boy? (1976) (two photographs, one of a nude baby boy and the other of a nude baby girl; one photograph of a nude young boy, and another photograph of a nude two or three year old girl); M. Goldstein, E. Haeberle and W. McBride, The Sex Book: A Modern Pictorial Encyclopedia (1971) (pictures of nude children, some showing genitalia); W. McBride and Fleischhauer-Hardt, Show Me! (1975) (pictures of nude children, some touching their own genitals and one of a young girl simply touching the penis of a young boy); and G. Nass, R. Libby and M. Fisher, Sexual Choices (1981) (at page 241, photograph of a one or two year old girl playfully and innocently holding on to the penis of a boy of the same age; nude photographs of a single child at pages 39, 50 and 281 which do not show genitalia).

10. *See, e.g.*, Growing Up Feeling Good, *supra*, note 9 at pp. 30 and 34; The Sex Book: A Modern Pictorial Encyclopedia, *supra*, note 9, at pp. 26, 31, 37, 83, 85, 86, 130-31; Show Me!, *supra*, note 9, at pp. 88-89, 100-01, 104-05, 106-07, 112-13, 158-60, 166-69.

gaged in sexual conduct will preclude parents from educating their children about sexual matters.

Additionally, respondent (p. 13) points to two popular movies, "Pretty Baby," and "The Exorcist," as works which would be encompassed by the New York statute. Of course, those films have not yet been made available to the Court; indeed, counsel for the respondent does not even state that he has seen them, and admitted that he had not when making the identical argument to the New York Court of Appeals. Apparently, he still has not seen them, because in "Pretty Baby" no sex act of a child is shown. The only scenes depicting child nudity are one in which a baby is nursed by her mother, one in which a young girl (Brooke Shields) poses nude for a photographer and another scene in which she is getting out of a bathtub. In the bathtub and posing scenes, her breasts and buttocks are exposed but there is no display of genitalia. In "The Exorcist," there is no lewd display of the genitals of a child. The only sex act even remotely suggested occurs for a brief second when it is made to appear that a young girl (Linda Blair), who is fully covered in a sheet or nightgown, thrusts a crucifix between her legs under the gown. It is impossible to say that any actual sexual conduct is taking place in this scene; even if it could be said that sexual conduct was being "simulated," that simulation does not fit within the statute because it is not accompanied by any nudity. *See* N.Y. Penal Law §263.00(6). Significantly, with respect to motion pictures, respondent has failed to dispute that the alternate methods of production, discussed in our main brief at page 25, permit production of movies portraying the sexual conduct of children without making children engage in or simulate that conduct.

Even if the production or dissemination of a few works of arguable value were discouraged by the New York statute, that would be a small price to pay for protecting children from substantial evil. Yet, the failure of respondent and *amici* publishers to identify books and films which they believe deserve protection, but which would be encompassed by the statute, is a tell-tale sign that their First Amendment concerns are divorced from reality. It is significant that among the *amici* are publishers who, presumably, have access to virtually all books ever published. And of all the books ever published, they are able to point to so few which they opine could be encompassed by New York's statute, even though they maintain that the statute is so substantially overbroad.[11] Of these works, it is certain that most are not included within the statute. Nor, in fact, is it clear that any one of them depicts sexual activity or lewd exhibition of the genitals within the meaning of the statute. *See* notes 7-9, pp. 13-15, *supra*. That no books or movies have been found is not surprising, because ideas about the sexual conduct of children can be and almost always are expressed without making a child engage in such conduct. Finally, in the unlikely event that a few such books or movies exist or will exist in the future, case by case adjudication would adequately protect them.

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11. Interestingly, research by *amici* publishers and respondent has not discovered any pictorial representations of the New Guinean "fertility rites," referred to in the Court of Appeals' opinion. *See* App. A to Petition for Certiorari at 5a.

(4) The overbreadth problem, if any, can be dealt with on a case by case basis, and even if the statute is overbroad with respect to a distinct category of cases, the state courts must first be given an opportunity to give the statute a limiting construction.

As *amici* publishers correctly point out, petitioner concedes that the statute may well be overbroad with respect to certain kinds of dissemination, even though the content of the material itself is not protected. For example, the New York statute, read literally, would apply to news media reports on the "kiddie porn" industry if sexually explicit materials were actually reprinted or broadcast. Similarly, at page 13 n.8, respondent argues that the statute is overbroad because it encompasses dissemination by well-intentioned people to a person involved in the legislative, judicial, or executive branches of government, or even to the news media. In such circumstances, the possibility of prosecution is so remote, indeed virtually non-existent, that no such activity would be deterred. Moreover, if there should ever be a prosecution of constitutionally protected dissemination, then, as *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), teaches, a case by case approach can effectively deal with the problem of overbreadth. Such an approach protects against unconstitutional applications of the statute while permitting the statute to protect children from sexual abuse by prohibiting the vast majority of dissemination which feeds both the demand and supply sides of the market.

The Oklahoma statute challenged in the *Broadrick* case prohibited public employees from engaging in all

"political activity." This Court recognized, however, that the Oklahoma statute could constitutionally encompass a "substantial spectrum" of partisan political activity (*id.* at 616), even though on its face the statute also covered political activity which could not be prohibited because it was constitutionally protected. *Id.* at 617-18. Indeed, even though political activity is at the very core of the values protected by the First Amendment, still, a case by case analysis of fact situations could cure whatever overbreadth existed. Neither *amici* publishers nor respondent gives any reason why a similar approach does not recommend itself to the section 263.15 ban on dissemination of materials which certainly have no greater First Amendment value than non-partisan political activity. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 216 (1975). By analogy to *Broadrick,* the New York statute is constitutional on its face because it encompasses a substantial spectrum of unprotected dissemination even though on its face it also covers certain limited kinds of dissemination which are protected by the First Amendment.

Returning to the alleged overbreadth problem with respect to scientific, medical or educational works which include depictions of the sexual conduct of children as an "essential part of their content" (Brief for *Amici* Publishers: 21), a similar approach recommends itself. The statute encompasses a substantial spectrum of unprotected sexually explicit material depicting children. There is no sound reason why, as with the limited category of political activity involved in *Broadrick,* a case by case approach could not deal with the limited category of such scientific, medical or educational materials. This is especially so in light of the paucity of examples offered by *amici* publishers,

which makes it clear that this statute will have neither a real nor a substantial deterrent effect on legitimate expression. *See Erznoznik* v. *City of Jacksonville*, 422 U.S. at 216.

Finally, even assuming that a case by case approach is not appropriate for that limited category of materials, the New York Court of Appeals should be afforded an opportunity to construe the statute in a manner which would overcome any overbreadth problem. When this case was before that court it found no limiting construction possible because it believed that a state could prohibit the dissemination of materials explicitly depicting children engaged in sexual conduct only if the materials are obscene. Our briefs make it clear that the state court erred in that regard. If this Court should so hold, then the case should be reversed and remanded for reconsideration in accord with the principles enunciated.

Conclusion

The judgment appealed from should be reversed.

Respectfully submitted,

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